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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ACRES BONUSING, INC., a Nevada Corporation, and JAMES ACRES, an individual, Plaintiff, v. LESTER MARSTON, an individual; ARLA RAMSEY, an individual; THOMAS FRANK, an individual; ANITA HUFF, an individual; RAPPORT AND MARSTON, an association of attorneys; DAVID RAPPORT, an individual; COOPER DAMARSE, an individual; DARCY VAUGHN; an individual; KOSTAN LATHOURIS, an individual; BOUTIN JONES INC., a California corporation; MICHAEL CHASE, an individual; DANIEL STOUDER, an individual; AMY O'NEILL, an individual; JANSSEN MALLOY LLP, an association of attorneys; MEGAN YARNALL, an individual; AMELIA BURROUGHS, an individual, and DOES 1-20, inclusive, Defendants.	Case No. 3:19-cv-05418-WHO **DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER & AMY O'NEILL'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' COMPLAINT** Complaint Filed: August 28, 2019 Hearing Date: May 18, 2022 Time: 2:00 p.m. Judge: Hon. William H. Orrick

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Federal Cases

///

State Cases

Federal Statutes and Rules

State Statutes and Rules

I. INTRODUCTION

Boutin Jones Inc., Daniel Stouder, Amy O'Neill, and Michael Chase (collectively "Boutin Jones Defendants") submit this Rule 12(b)(1) motion to dismiss the Complaint filed by Plaintiffs Acres Bonusing, Inc. ("ABI") and James Acres' ("Acres") for lack of subject matter jurisdiction and this Rule 12(b)(6) motion to dismiss the Complaint for failure to state claims for which relief can be granted. The motion to dismiss should be granted under Rule 12(b)(1) because this Court has no subject matter jurisdiction over the Boutin Jones defendants given that the allegations in the Complaint all pertain to litigation activity in their role as attorneys for Blue Lake Casino, and so they are entitled to personal prosecutorial immunity. Alternatively, the motion to dismiss should be granted under Rule 12(b)(6) because ABI's state law claims are barred by the one-year statute of limitations applicable to actions against attorneys arising out of their performance of professional services under California Code of Civil Procedure § 340.6. In addition, the RICO claim fails to state a claim for which relief can be granted because the litigation activity alleged in the Complaint does not constitute predicate acts giving rise to the level of a "pattern of racketeering activity" under the RICO statute.

II. STATEMENT OF FACTS

The Blue Lake Rancheria is a federally recognized Indian Tribe in Humboldt County, California, and is organized under the Constitution of the Blue Lake Rancheria (Compl. ¶ 9). Blue Lake Casino and Hotel ("Blue Lake Casino") is owned and operated by Blue Lake (Compl. ¶ 12). The tribal court of the Blue Lake Rancheria was established by the Blue Lake Business Council (Compl. ¶ 11). James Acres is the owner of Acres Bonusing, Inc. ("ABI"), a Nevada company (Compl. ¶¶ 7-8). In 2010, Blue Lake Casino and Acres negotiated an agreement whereby Blue Lake Casino purchased an iSlot gaming system ("iSlot System") from ABI (Compl. ¶ 44). The iSlot System is an iPad-based gaming platform (Compl. ¶ 44). In 2015, a dispute arose between Blue Lake Casino and Acres and ABI regarding the expired iSlot agreement (Compl. ¶¶ 47-48). Boutin Jones attorneys Daniel Stouder, Amy O'Neill, and Michael Chase represented Blue Lake Casino in this underlying action until Boutin Jones substituted out of the case with a substitution of counsel filed on March 1, 2017 (Compl. ¶¶ 23-26, 111) (Declaration of Debra Sturmer in Support

of Defendants' Motion to Dismiss (Sturmer Decl.) ¶ 5, Ex. B (Notice of Appearance and Substitution of Counsel)).

The Complaint includes conflict of interest allegations pertaining to Judge Marston – *i.e.*, that Judge Marston had been serving for over a year as attorney of record for Blue Lake in *Blue Lake v. Shiomoto* and was also providing legal advice on gaming compact renegotiations (Compl. ¶¶ 35, 36). The Complaint alleges that "[i]nstead of assigning *Blue Lake v. ABI* to another judge, Judge Marston retained it for himself," notwithstanding Blue Lake tribal court judicial conduct rules (Compl. ¶¶ 39, 40). As to Boutin Jones, the Complaint alleges that "Boutin Jones attorneys filed the complaint in *Blue Lake v. ABI* and prosecuted the case for over a year," that "Boutin Jones also represented Blue Lake Casino in both related federal actions initiated by Mr. Acres to enjoin *Blue Lake v. ABI*," and that Boutin Jones represents Blue Lake in an employment tax dispute alongside Rapport and Marston (Compl. ¶ 23). The Complaint alleges that Michael Chase, a shareholder attorney at Boutin Jones, "personally appeared on behalf of Blue Lake Casino in *Acres v. Blue Lake I* and *Acres v. Blue Lake II*" and is also a named attorney for Blue Lake in *Blue Lake v. Lanier* (Compl. ¶ 24); *see also* Sturmer Decl. ¶¶ 7, 8 (Ex. D (Complaint filed in *Acres v. Blue Lake I*); (Ex. E (Complaint filed in *Acres v. Blue Lake II*)). Likewise, the Complaint alleges that Dan Stouder, a shareholder attorney at Boutin Jones, "was an attorney of record representing Blue Lake Casino in *Blue Lake v. ABI* and *Acres v. Blue Lake I and II*, and personally appeared in federal court on Blue Lake Casino's behalf in *Acres v. Blue Lake II*" (Compl. ¶ 25).

The underlying litigation centered on an agreement between Blue Lake and ABI to purchase iSlot – a novel iPad-based gaming platform – from ABI and further negotiations to obtain nation-wide distribution rights to the platform (Compl. ¶¶44-45). On August 17, 2015, Stouder sent a letter to ABI demanding ABI pay $320,678.90 to Blue Lake Casino in order to avoid legal action regarding iSlot (Compl. ¶ 48). The Complaint alleges that Blue Lake Casino and ABI exchanged correspondence through their attorneys for the remainder of 2015 and ultimately Blue Lake served ABI with a summons in January 2016 (Compl. ¶ 52).

The instant Complaint lays out allegations pertaining to typical commercial litigation practice as to the filing of the motion to dismiss on behalf of Blue Lake in *Acres v. Blue Lake I, i.e.*,

that "Judge Marston [b]illed Blue Lake for a 'conference with Rapport regarding the status of the filing of the Tribe's brief in federal court'" (Compl. ¶ 70), "Judge Marston [b]illed Blue Lake to '[r]eview and revise the brief [to be] filed in support of the Tribe's motion to dismiss in the Acres federal court case'"' (Compl. ¶ 71), and that Stouder and O'Neill, Blue Lake Casino's attorneys, filed the motion to dismiss in federal court about a week after reviewing and revising the brief in consultation with Rapport (Compl. ¶ 72). As to conflict of interest, the Complaint alleges that the law firms of Rapport and Marston and Boutin Jones have a significant history of collaboration, including on *Blue Lake v. Lanier* (a dispute between Blue Lake and the State of California), a referral from Rapport to Boutin Jones regarding the City of Ukiah, and the *Acres v. Blue Lake* litigation (Compl. ¶ 74). Plaintiffs also allege in the Complaint that the circumstances under which a September 9, 2016, hearing on the motion to disqualify Judge Marston and other motions took place caused Acres to "feel nervous and physically threatened" because of the seven individuals present at the hearing, six of which were employed by Blue Lake and three of which carried firearms, and that two of Blue Lake's armed employees maintained positions blocking the only two exits from the windowless hotel conference room throughout the hearing (Compl. ¶ 82).

In early December 2006, the District Court in *Acres v. Blue Lake II* ordered Judge Marston to provide Acres with billing records and then sit for a deposition by Acres (Compl. ¶ 103). Judge Marston subsequently recused himself (Compl. ¶ 105). Following the recusal, on January 10, 2017, Judge Marston appointed Justice Lambden to preside over *Blue Lake v. ABI* (Compl. ¶ 109). In mid-February 2017, O'Neill, Stouder, and Boutin Jones all withdrew from *Acres v. Blue Lake II* and *Blue Lake v. ABI* and the Blue Lake CEO appointed Burroughs, Yarnall and Janssen Malloy as Blue Lake's attorneys in both actions (Compl. ¶ 111). In late February 2017, the District Court held that with the recusal of Judge Marston, a finding of bad faith against Blue Lake tribal court could not be supported, and dismissed *Acres v. Blue Lake II* (Compl. ¶ 112). Justice Lambden subsequently dismissed Acres from *Blue Lake v. ABI* on summary judgment on July 18, 2017 (Comp. ¶ 113) (Sturmer Decl. ¶ 6, Ex. C).

Acres filed a complaint on July 13, 2018, in Sacramento County Superior Court, in *Acres v. Marston, et al.*, Case No. 2018-34-00236929, alleging the same state law causes of action that ABI

alleges in this complaint against the same defendants named in the instant complaint (Compl. ¶ 32) (Sturmer Decl. ¶ 9, Ex. F). All defendants in the state court action asserted sovereign immunity (Compl. ¶ 32). ABI and Acres filed the instant Complaint in the Northern District of California on August 28, 2019 (Compl. ¶¶ 6, 13-29). In the Complaint, ABI alleges claims for: (1) wrongful use of civil proceedings; (2) aiding and abetting wrongful use of civil proceedings; (3) conspiracy to commit wrongful use of civil proceedings; (4) breach of fiduciary duty; (5) aiding and abetting breach of fiduciary duty; (6) constructive fraud; (7) aiding and abetting constructive fraud; and (8) RICO.

III. PROCEDURAL BACKGROUND

After Plaintiffs James Acres and Acres Bonusing, Inc., filed the Complaint on August 28, 2019, Boutin Jones filed a motion to dismiss and a motion to strike on December 31, 2019 in District Court. Defendants Amelia Burroughs, Janssen Malloy LLP, and Meghan Yarnall also filed a motion to dismiss and motion strike the complaint on January 3, 2020, and Defendant Lester Marston filed a separate motion to dismiss on January 3, 2020. On April 15, 2020, the District Court issued an order granting the motions to dismiss. The Court concluded that all of the defendants were functioning as the Tribe's officials or agents when the acts alleged in the Complaint were committed (Order at 7). Plaintiffs appealed the District Court's order to the Ninth Circuit and on November 8, 2021, the Ninth Circuit issued an opinion affirming in part, reversing in part, and remanding, in a published opinion in *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901 (9th Cir. 2021).

The Ninth Circuit held that the District Court erred as to the conclusion that tribal sovereign immunity shielded all defendants from suit, noting that some of the defendants were, however, entitled to absolute personal immunity, and that "[t]here may yet be grounds to dismiss what remains of this case, but the district court did not reach these issues and we leave them to the district court on remand." *See Acres Bonusing, Inc*., 17 F.4th at 905. Following a case management conference, on January 25, 2022, the District Court issued a minute order stating that within thirty days of the decision of the California Supreme Court whether to take up the appeal of the parallel California Court of Appeal opinion, "the defendants shall file renewed motions to

dismiss, including but not limited to issues related to prosecutorial immunity . . ." The California Supreme Court denied Acres' petition for review on February 25, 2022.

IV. APPLICABLE LEGAL STANDARDS

A Plaintiff bears the burden of establishing federal subject matter jurisdiction and in effect, the court presumes lack of jurisdiction until plaintiff proves otherwise. *In re Wilshire Courtyard*, 729 F.3d 1279, 1284 (9th Cir. 2013). A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made on the basis that the complaint (together with documents attached to the complaint and any judicially noticed facts) fails to establish grounds for federal subject matter jurisdiction as required by Rule 8(a)(1) - *i.e.*, lack of federal jurisdiction appears from the "face of the complaint." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). The court need not accept as true legal conclusions, legal conclusions couched as factual allegations, or inferences unsupported by the facts set out in the complaint. *Lacano Investments, LLC v. Balash*, 765 F.3d 1068, 1071-1072 (9th Cir. 2014) (legal conclusions disregarded even if cast as factual allegations).

A pleading is deficient and may be dismissed under Rule 12(b)(6) if a plaintiff fails "to state a claim upon which relief can be granted." A complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). If a claim sets forth facts that are "merely consistent with" defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (citing *Twombly*, 550 U.S. at 557). Allegations of wrongdoing will be deemed "implausible" if there are "obvious alternative explanation[s]" for the facts alleged indicating lawful conduct, not the unlawful conduct urged by plaintiff. *Id.* at 682. Material properly submitted with the complaint (*i.e.*, exhibits under Rule 10(c)) may be considered as part of the complaint for purposes of a Rule 12(b)(6) motion to

dismiss. *In re NVIDIA Corp. Secur. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014). Under Federal Rule of Civil Procedure 9(b), a party must "state with particularity the circumstances constituting fraud or mistake," including "the who, what, when, where, and how of the misconduct charged." *Vess v. Ciba–Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (internal quotation marks omitted). However, "Rule 9(b) requires only that the circumstances of fraud be stated with particularity; other facts may be pleaded generally, or in accordance with Rule 8." *United States ex rel. Lee v. Corinthian Colls.*, 655 F.3d 984, 992 (9th Cir. 2011). When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff a chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice, unless it is clear that to do so would be futile. However, a plaintiff should be denied leave to amend a complaint if it is clear that the complaint cannot be cured by the allegation of different facts. *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016).

V. ARGUMENT

A. THE BOUTIN JONES DEFENDANTS HAVE PERSONAL IMMUNITY BASED UPON THEIR REPRESENTATION OF BLUE LAKE CASINO IN THE UNDERLYING ACTION

1. Prosecutorial Immunity is a Complete Defense to Plaintiffs' Personal-Capacity Suits against the Boutin Jones Defendants

The Supreme Court in *Lewis v. Clarke*, 137 S. Ct. 1285, 1290 (2017), explained that "[i]n an official-capacity claim, the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself," but that "[p]ersonal-capacity suits, on the other hand, seek to impose *individual* liability upon a government officer for actions taken under color of state law" including in the context of tribal sovereign immunity. *Id.* at 1291.

In a published Ninth Circuit opinion in *Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 905 (9th Cir. 2021), following the District Court's denial of the previous motion to dismiss in this litigation, the Ninth Circuit concluded that tribal sovereign immunity did not shield all defendants from suit, and concluded, however, that "[a]lthough tribal sovereign immunity does not bar this action, defendants may still avail themselves of personal immunity defenses" (citing *Lewis*, 137 S.

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Ct. at 1291 (explaining that although 'sovereign immunity does not erect a barrier against suits to impose individual and personal liability,' '[a]n officer in an individual-capacity action ... may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances' (quotations omitted)); *Pistor*, 791 F.3d at 1112)." *See id.* at 914.

In the parallel California Court of Appeal case in this litigation, the Court of Appeal concluded that Rapport and Marston, Rapport, DeMarse, Burrell, Vaughn, and Lathouris were all entitled to absolute immunity for their work on behalf of the Blue Lake casino. *See Acres v. Marston*, 72 Cal.App.5th 417, 447. The Court of Appeal rejected the contention that no respondent could enjoy prosecutorial immunity because *Blue Lake v. Acres* was not a criminal proceeding and further rejected the contention that the Court "should not extend immunity to civil litigators from private law firms acting on behalf of a for-profit commercial enterprise." *Acres*, 72 Cal.App.5th at 449 (internal quotation omitted).

In particular, the Court expressly rejected the contentions that: "(1) only a tribe's in-house counsel can assert immunity, and (2) a tribe's counsel can only assert immunity in suits involving traditional governmental matters (as opposed to 'for-profit commercial' matters)." *Id.* The Court of Appeal further stated that: "As the Supreme Court explained in *Filarsky*, a case involving the immunity of a private attorney who a city had hired for an investigation, '[a]ffording immunity not only to public employees but also to others acting on behalf of the government' is consistent with historical practices and 'serves to ''ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service.''" *Id.* at 349-50, citing *Filarsky v. Delia*, 566 U.S. 377, 390 (2012); *see also Davis v. Littell*, 398 F.2d 83, 85 ("That a tribe finds it necessary to look beyond its own membership for capable legal officers, and to contract for their services, should certainly not deprive it of the advantages of the rule of privilege otherwise available to it").). In *Great Western Casinos, Inc. v. Morongo Band of Mission Indians* (1999) 74 Cal.App.4th 1407, 1423-34, the Court concluded that a law firm and general counsel for a Tribal were immune from suit. In *Acres Bonusing, Inc.*, the Ninth Circuit harmonized *Great Western Casinos, Inc.*, with the Supreme Court's subsequent decision in *Lewis*, concluding that "[t]o the extent *Great Western* held that these lawyers were entitled to a personal immunity defense (essentially as quasi-executive

officers), that conclusion would not on its own contravene *Lewis* . . . [b]ut to the extent *Great Western* extended tribal sovereign immunity to the individual defendants merely because they were sued for conduct within the scope of their employment for the tribe, that conclusion would be at odds with *Lewis* and not one we could follow." *Acres Bonusing, Inc.*, 17 F.4th at 914, citing *Lewis*, 137 S. Ct. at 1288.

Based upon the allegations as set forth in the Complaint, the Boutin Jones attorneys are entitled to a personal immunity defense based upon their acts in the course of their representation of Blue Lake Casino in its dispute with Plaintiffs. *See Acres*, 17 F.4th at 914; *Great Western Casinos, Inc.*, 74 Cal.App.4th at 1424. In *Filarsky*, the Court did conclude that an attorney was entitled to qualified immunity – rather than absolute immunity – but in that case, the attorney seeking immunity was retained by a municipality to serve as an internal affairs investigator, a role comparable to law enforcement officials performing functions entitled to qualified rather than absolute immunity. *Compare Filarsky*, 566 U.S. at 393-94; *with Butz v. Economou*, 438 U.S. 478, 508-12 (1978) (characterizing the functions of a prosecutor as requiring absolute immunity rather than qualified immunity); *see also Acres Bonusing, Inc.*, 17 F.4th at 914 (concluding that "[t]o the extent *Great Western* held that [a general counsel and law firm] were entitled to a personal immunity defense (essentially as quasi-executive officers)" that conclusion would not contravene precedent, in contrast to interpreting the Court's opinion as concluding that absolute immunity was derived directly from tribal sovereign immunity rather than personal immunity). The Ninth Circuit clearly stated that "[a]lthough tribal sovereign immunity does not bar this action, defendants may still avail themselves of personal immunity defenses" citing *Lewis*, 137 S. Ct. at 1291, for the proposition that although "sovereign immunity does not erect a barrier against suits to impose individual and personal liability" "[a]n officer in an individual-capacity action . . . may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances." *See Acres Bonusing*, 17 F.4th at 914.

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2. The Boutin Jones Defendants are Entitled to Immunity Because Plaintiffs' Claims are Based Upon Their Litigation Activity in Their Personal Capacity as Prosecuting Attorneys for a Sovereign Entity

The Complaint is devoid of factual allegations that the acts of the Boutin Jones attorneys were not done on Blue Lake Casino's behalf, or outside the scope of authority granted to the Boutin Jones attorneys by Blue Lake Casino, or involve conduct outside the confines of the litigation instituted by the client. Instead, the factual allegations of wrongful conduct alleged against the Boutin Jones attorneys in the Complaint include: (1) actions taken by Boutin Jones attorneys in the pre-litigation dispute with Plaintiffs regarding the iSlot software; (2) actions taken by Boutin Jones attorneys in the tribal court action against Plaintiffs, including causing pleadings, motions, and other documents to be filed and served and appearing on behalf of Blue Lake Casino at hearings; (3) actions taken by the Boutin Jones attorneys in the related federal court actions filed against Blue Lake Casino by Acres, including causing pleadings, motions, and other documents to be filed and served on Acres and appearing at hearings, and (4) the Boutin Jones Defendants' representation of the tribe and/or Blue Lake Casino on other, unrelated matters (Compl. ¶¶ 1, 4-5, 23-26, 32, 34, 41, 48-50, 52, 72-74, 81, 90-92, 98(b)-(c), 110-111, 115-116, 136, 148-150, 156-157, 199, 202, 205, 208(a)).

Because the claims in the Complaint are all based upon the Boutin Jones attorneys' litigation activity in their capacity as prosecuting attorneys, in the course of their representation of Blue Lake Casino in its dispute with Plaintiffs, the Boutin Jones attorneys are entitled to a personal immunity defense. *See Acres*, 17 F.4th at 914; *Great Western Casinos, Inc.*, 74 Cal.App.4th at 1424. In particular, the wrongful use of civil proceedings claim in the Complaint is premised upon the Boutin Jones attorneys' litigation efforts, in that the Complaint alleges that defendants "could not have reasonably believed there were reasonable grounds to bring or maintain *Blue Lake v. ABI* against ABI" (Compl. ¶ 138) and defendants "brought or continued the *Blue Lake v. ABI* claim against ABI for reasons other than succeeding on the merits of the claim" (Compl. ¶ 139).

The aiding and abetting the wrongful use of civil proceedings claim is also based on the same substantive allegations regarding litigation activity, as is the conspiracy to commit wrongful use of civil proceedings cause of action. Likewise, the aiding and abetting breach of fiduciary duty

claim is also premised upon the Boutin Jones attorneys' litigation activity, in that the Complaint alleges that "Judge Marston had ex-parte communication regarding *Blue Lake v. ABI* with individuals Judge Marston knew to be attorneys doing work for Blue Lake, Blue Lake Casino, or Ms. Ramsey" and "Judge Marston allowed individuals he knew to be attorneys doing work for Blue Lake Casino to provide him with ex-parte memos and draft orders regarding *Blue Lake v. ABI*" (Compl. ¶¶ 164, 171). The aiding and abetting constructive fraud claim in the Complaint is premised upon the provision of legal services, alleging that "Judge Marston breached the fiduciary duty owed to ABI by failing to disclose the required material facts about his providing legal services to Blue Lake, Blue Lake Casino, Ms. Ramsey, and any related parties" (Compl. ¶ 182), and further that the "Marston Fraud Abettors each knew Judge Marston was committing constructive fraud against ABI because each of the Marston Fraud Abettors knew of a substantial portion of Judge Marston's conduct described in the sixth cause of action" (Compl. ¶¶ 188, 192). Finally, the RICO claim is grounded upon allegations that defendants operated or managed the tribal court in a scheme to obtain money by false pretenses, including subjecting Plaintiffs to a wrongful use of civil proceedings in *Blue Lake v. ABI* (Compl. ¶ 199).

All of the allegations against the Boutin Jones Defendants' arise from discretionary decisions and activity undertaken in prosecuting their client's claims against Acres and ABI. Accordingly, the Boutin Jones defendants' Rule 12(b)(1) motion to dismiss Plaintiffs' Complaint should be granted without leave to amend.

B. ABI AND ACRES HAVE FAILED TO STATE A RICO CLAIM BECAUSE PLAINTIFFS CANNOT ALLEGE THE REQUISITE PREDICATE ACTS TO SHOW A PATTERN OF RACKETEERING ACTIVITY

In *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014), Ninth Circuit explained that "the RICO statute sets out four elements: a defendant must participate in (1) the conduct of (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity or collection of unlawful debt. 18 U.S.C. § 1962(c)" and "[i]n addition, the conduct must be (5) the proximate cause of harm to the victim," citing *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496–97 (1985). The Court stated that that "[t]o show the existence of an enterprise under the second element, plaintiffs must plead that the enterprise has (A)

a common purpose, (B) a structure or organization, and (C) longevity necessary to accomplish the purpose." *See id.*, citing *Boyle v. United States*, 556 U.S. 938, 946 (2009). The Court also stated that "[r]acketeering activity, the fourth element, requires predicate acts, which [may include] mail and wire fraud under 18 U.S.C. §§ 1341 and 1343. . ." *See id.*; *Schreiber Distrib. Co. v. Serv–Well Furniture Co., Inc.*, 806 F.2d 1393, 1399 (9th Cir. 1986).

In *United States v. Koziol*, 993 F.3d 1160, 1174 (9th Cir. 2021), the Ninth Circuit stated that Courts have concluded that litigation activity cannot constitute a predicate act for purposes of stating a civil RICO claim, in the context of comparing sham litigation for purposes of Hobbs Act liability, explaining that: "Indeed, in these cases the courts concluded that RICO does not authorize suits by private parties asserting claims against business or litigation adversaries, based on litigation activities, and seeking treble damages, costs, and attorneys' fees," citing [*Kim* v. *Kimm*, 884 F.3d 98, 104 (2d Cir. 2018] ("'[I]f litigation activity were adequate to state a claim under RICO, every unsuccessful lawsuit could spawn a retaliatory action,' which 'would inundate the federal courts with procedurally complex RICO pleadings'" (citations omitted)); [*Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016)] (explaining that litigation tactics cannot be a predicate for a civil RICO claim); [*Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003)] ("[R]ecognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim.") . . ."

The Ninth Circuit further noted that "[i]n rejecting RICO liability based on litigation activities, these courts expressed policy concerns relating to ensuring access to the courts, promoting finality, and avoiding collateral litigation. *See Kim*, 884 F.3d at 104 (explaining that permitting RICO suits based on prior litigation activities would 'engender wasteful satellite litigation,' 'erode the principles undergirding the doctrines of res judicata and collateral estoppel,' and 'chill litigants and lawyers and frustrate the well-established public policy goal of maintaining open access to the courts' because 'pleading[s] and correspondence in an unsuccessful lawsuit could lead to drastic RICO liability' (citations omitted)) . . ." *Koziol*, 993 F.3d at 1174.

Plaintiffs do not allege any wrongful conduct by the Boutin Jones attorneys that amounts to a "pattern of racketeering activity" under the RICO statute. The scheme is described in the

Complaint as: including "wrongful use of civil proceedings in *Blue Lake v. ABI*," "[w]orking to ensure that judicial power in *Blue Lake v. ABI* would be exercised by attorneys working for Blue Lake," "[w]orking to conceal that judicial power in *Blue Lake v. ABI* was being exercised by attorneys working for Blue Lake," and "[f]alsely representing that Blue Lake Tribal Court was operating as an impartial tribunal" (Compl. ¶ 199). The alleged predicate acts concern litigation activities in the underlying action, including the allegations that, "dozens of filings were made in *Blue Lake v. ABI*, with proofs of service indicating that the filings were served via postal-mail" (Compl. ¶ 202); that "dozens of filings were made in *Blue Lake v. ABI*, with proofs of service indicating that the filings were served via email" (Compl. ¶ 205); and that "[a]ttorneys from Rapport & Marston ghostwr[ote] papers filed by Boutin Jones which were intended to convince the district court that Judge Marston was a neutral decision-maker" (Compl. ¶ 208). Accordingly, the scheme and the alleged predicate acts all arise from litigation activities and so cannot give rise to RICO liability. *See Koziol*, 993 F.3d at 1174; citing *Kim*, 884 F.3d at 104 (permitting RICO suits based on prior litigation activities would engender wasteful satellite litigation, erode res judicata and collateral estoppel, chill litigants and lawyers, and frustrate the public policy goal of maintaining open access to the courts).

C. ABI'S PENDENT STATE LAW CLAIMS ARE BARRED BY THE 1-YEAR STATUTE OF LIMITATIONS WHICH APPLIES TO ACTIONS AGAINST ATTORNEYS

Under California Code of Civ. Proc. §340.6, "[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission . . ." The Boutin Jones attorneys represented Blue Lake Casino in the underlying action until February 2017 when Boutin Jones substituted out of the case (Compl. ¶¶ 23-26, 111). On August 31, 2017, Justice Lambden issued a judgment of dismissal dismissing *Blue Lake v. ABI* in its entirety in tribal court, and ending the tribal court litigation. The District Court complaint not was filed until August 28, 2019, over a year after Boutin Jones substituted out of the case and the tribal court litigation ended

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entirely, and so the pendent state law claims in the Complaint governed by the one-year statute of limitations set forth in section 340.6 are therefore time-barred.

The California Supreme Court has explained that "section 340.6(a) applies to a claim where the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation – that is, an obligation the attorney has *by virtue of* being an attorney – in the course of providing professional services." *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1229 (emphasis in original). The fact that counsel from Boutin Jones did not represent Acres or ABI is not dispositive as to the application of the one-year statute of limitation. The California Supreme Court in *Lee* explained as to the legislative history underlying the statute of limitations that "the statute applies not only to actions for professional negligence but to any action alleging wrongful conduct, other than actual fraud, arising in the performance of professional services." *See Lee*, 61 Cal.4th at 1236.

In *Connelly v. Bornstein* (2019) 33 Cal.App.5th 783, 799, the Court concluded that the one-year statute of limitations under § 340.6 applied to bar a malicious prosecution action against a landlord and her counsel and stated that "consistent with *Lee*, section 340.6(a) applies to malicious prosecution claims against attorneys who performed professional services in the underlying litigation." *See also Garcia v. Rosenberg* (2019) 42 Cal.App. 5th 1050, 1060 (stating that subsequent to *Lee*, "in *Connelly*, the court concluded an attorney who engages in malicious prosecution violates the obligation, embodied in the Rules of Professional Conduct, to not bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person" (citing *Connelly*, 33 Cal.App.5th at 794 (other internal citations and quotations omitted)).

The Complaint alleges as to the wrongful use of civil proceedings claim that the defendants "wrongfully brought or maintained a lawsuit against ABI" (Compl. ¶ 135); "were each materially involved in bringing or continuing *Blue Lake v. ABI*, which included several causes of action against ABI" (Compl. ¶ 136); that the defendants "could not have reasonably believed there were reasonable grounds to bring or maintain *Blue Lake v. ABI* against ABI" (Compl. ¶ 138); and that the defendants "brought or continued the *Blue Lake v. ABI* claim against ABI for reasons other than succeeding on the merits of the claim" (Compl. ¶ 139). Therefore, the wrongful use of civil

proceedings claim is time-barred as in *Connelly* and *Garcia*. *See Garcia*, 42 Cal.App. 5th at 1060; *see also Connelly*, 33 Cal.App.5th at 799. Even though the Complaint includes the additional allegation that defendants' "conduct towards ABI was despicable and rife with malice, oppression and fraud" (Compl. ¶ 144), this allegation is in the context of punitive damages, and fraud is not central or essential to the wrongful use of civil proceedings cause of action. The statute of limitations applicable to ABI's aiding and abetting and conspiracy to commit wrongful use of civil proceedings claims are the same as the underlying substantive claim, such that the one-year statute of limitations set forth in § 340.6 also applies to those claims, which necessarily arise also from the attorneys' performance of professional services. *See Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1478–1479 ("The statute of limitations for a cause of action for aiding and abetting a tort generally is the same as the underlying tort."); *see also Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 673 ("In an action based on civil conspiracy, the applicable statute of limitations is determined by the nature of the action in which the conspiracy is alleged.").

As to breach of fiduciary duty, courts have been clear that "[t]he [one-year] statute applies to an action for malpractice as well as breach of fiduciary duty arising out of the performance of an attorney's professional duties, but it does not apply to actions for fraud." *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1121, citing *Favila v. Katten Muchin Rosenman LLP* (2010) 188 Cal.App.4th 189, 223; *see also Vafi v. McCloskey* (2011) 193 Cal.App.4th 874, 881 ("action by a former client against his attorney for breach of fiduciary duty was subject to the statute of limitations under section 340.6 rather than the statute applicable to breach of fiduciary duty claims generally"); *Graham-Sult v. Clainos* 756 F.3d 724, 747 (9th Cir. 2014) (claim for aiding and abetting breach of fiduciary duty against an attorney was barred by the one-year statute of limitations found in § 340.6). The applicable statute of limitations as to the aiding and abetting breach of fiduciary duty claim is keyed to the substantive tort of breach of fiduciary duty, and so this claim is also time-barred, along with underlying substantive claim. *See Master Lease LLC*, 225 Cal.App.4th at 1478–1479; *see also Maheu*, 201 Cal.App.3d at 673.

Finally, the claims for constructive fraud and aiding and abetting constructive fraud are also time-barred and do not fall within the exception for actual fraud set forth in section 340.6 for the

one-year time bar. *See, e.g., Quintilliani v. Manerino* (1998) 62 Cal.App.4th 54, 69 (concluding "that the exception for actual fraud in section 340.6 was intended to apply to intentional fraud, not constructive fraud resulting from negligent misrepresentation" and that "[c]onstructive fraud may result from a breach of fiduciary duty, regardless of intent or motive, and the Legislature intended to only except instances of actual fraud on grounds that acts of actual fraud should not be treated as legal malpractice (citations omitted)"). Accordingly, all state law claims against the Boutin Jones defendants are time-barred.[1]

VI. CONCLUSION

The Boutin Jones Defendants respectfully request that this Court grant their Rule 12(b)(1) Motion to Dismiss Plaintiffs' Complaint in its entirety based on the defense of personal immunity, without leave to amend. Alternatively, the Boutin Jones Defendants respectfully request that this Court grant their Rule 12(b)(6) Motion to Dismiss Plaintiffs' Complaint in its entirety without leave to amend for failure to state a claim upon which relief can be granted, or if the entire Complaint is not subject to dismissal, that the Court dismiss each claim for which Plaintiffs have failed to state a claim for which relief can be granted, without leave to amend.

DATED: March 23, 2022

LERCH STURMER LLP

By /s/
Jerome N. Lerch, Esq.
Debra Steel Sturmer, Esq.
David Lerch, Esq.
Attorneys for Defendants BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER, and AMY O'NEILL

[1] ABI also has failed to state a claim for aiding and abetting breach of fiduciary duty and aiding and abetting constructive fraud because these claims are also barred by the litigation privilege found in California Civil Code § 47(b). The litigation privilege applies to any communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action. *Mansell v. Otto* (2003) 108 Cal.App.4th 265, 271. This privilege also extends to statements made outside of judicial proceedings; and "statements made to (and information concealed from)" the plaintiff and the court related to the action. *Graham-Sult v. Clainos*, 756 F.3d 724, 742 (9th Cir. 2014). ABI does not allege any conduct by the Boutin Jones Defendants that wasn't a communication made in connection with a judicial proceeding. The broad scope of the litigation privilege therefore protects the Boutin Jones Defendants from liability as to these claims.

DECLARATION OF SERVICE

I am a citizen of the United States, I am over the age of eighteen years and not a party to the within cause; I am employed in the City and County of San Francisco, California and my business address is One Sansome Street, Ste. 2060, San Francisco, California 94104. My electronic service address is rvernola@lerchsturmer.com. On this date, I served the following documents:

DEFENDANTS BOUTIN JONES INC., MICHAEL CHASE, DANIEL STOUDER & AMY O'NEILL'S MEMORANDUM OF POINTS & AUTHORITIES IN SUPPORT OF RULE 12(b)(1) AND RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' COMPLAINT

on the parties identified below, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below by the following means of service:

____: By First Class Mail -- I placed the sealed envelope(s), with first class postage thereon, for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

___: By Overnight Courier -- I caused each such envelope to be given to an overnight mail service at San Francisco, California, to be hand delivered to the office of the addressee(s) on the next business day.

____: By Personal Service – I caused each such envelope to be given to a messenger at San Francisco, California, to be hand delivered to the office of the addressee(s) on this date.

___: Facsimile -- (Only where permitted. Must consult CCP §1012.5 and California Rules of Court 2001-2011. Also consult FRCP Rule 5(e). Not currently authorized in N.D.CA.)

√ : By E-mail -- I electronically served each party at the email addresses shown on this declaration.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

EXECUTED on March 24, 2022 at Pleasant Hill, California.

Rosemarie Vernola
(type/print name)

Rosemarie Vernola
(signature)

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